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"Hope, Brian" <Hope.Brian@epa.gov>
FW: EPA Revised Policy on Exclusions from “Ambient Air” - Petition for Reconsideration and Petition for Rulemaking
To: "CMS.OEX" <cms.oex@epa.gov>

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From: Rachel Fullmer <rfullmer@edf.org>
Sent: Monday, February 3, 2020 5:24 PM
To: Wheeler, Andrew <wheeler.andrew@epa.gov>; Mathias, Scott <Mathias.Scott@epa.gov>
Cc: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; A-AND-R-DOCKET <A-AND-R-DOCKET@epa.gov>
Subject: EPA Revised Policy on Exclusions from “Ambient Air” - Petition for Reconsideration and Petition for Rulemaking

Dear Administrator Wheeler,

Environmental Defense Fund, Clean Air Task Force, Sierra Club and the Natural Resources Defense Council respectfully submit the attached petition for reconsideration and rulemaking regarding EPA’s *Revised Policy on Exclusions from “Ambient Air”* (Dec. 3, 2019). EPA should convene a proceeding for reconsideration under Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), in order to correct significant deficiencies in the 2019 Policy. Further, the Agency should immediately undertake a notice-and-comment rulemaking on this matter to allow for meaningful public input and ensure that the regulatory definition of “ambient air” is in line with EPA’s obligations under the Clean Air Act to protect public health and the environment.

Copies of this petition have also been sent by first-class mail. If you have any questions about this petition please reach out to me at 303-447-7208 or

rfullmer@edf.org.

Rachel Fullmer

Rachel Fullmer
Attorney, U.S. Clean Air

Environmental Defense Fund
1875 Connecticut Ave NW, Suite 600,
Washington, DC 20009

Office: 303-447-7208

Cell: 574-339-4281
rfullmer@edf.org

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" **40 CFR § 50.1(e)**	**PETITION FOR RECONSIDERATION** **PETITION FOR RULEMAKING**

February 3, 2020

Respectfully Submitted by Environmental Defense Fund, Clean Air Task Force, Sierra Club and the Natural Resources Defense Council.

Environmental Protection Agency's ("EPA" or the "Agency") final action *Revised Policy on Exclusions from "Ambient Air"* ("2019 Policy")[1] alters the Agency's longstanding approach on the exclusion of certain areas from the scope of "ambient air" under the Clean Air Act and EPA regulations. EPA's action is arbitrary, capricious, and contrary to the plain meaning of the Clean Air Act. This revision also conflicts with the Agency's existing regulatory definition of "ambient air" in 40 C.F.R. § 50.1(e).

Environmental Defense Fund, Clean Air Task Force, Sierra Club, and the Natural Resources Defense Council respectfully petition EPA to convene a proceeding for reconsideration under Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), in order to correct significant deficiencies in the 2019 Policy. Further, the Agency should immediately undertake a notice-and-comment rulemaking on this matter to allow for meaningful public input and ensure that the regulatory definition of "ambient air" is in line with EPA's obligations under the Clean Air Act to protect public health and the environment.

BACKGROUND AND HISTORY OF EPA'S REGULATORY DEFINITION OF "AMBIENT AIR"

The overriding purpose of the Clean Air Act is to "protect and enhance" air quality, 42 U.S.C. § 7401(a), and mitigate the "mounting dangers to the public health or welfare" caused by air pollution. 42 U.S.C. § 7401(a)(2). To that end, the Clean Air Act establishes "National Ambient Air Quality Standards," or NAAQS, for some of the most common "criteria" pollutants in the "ambient air." 42 U.S.C. § 7409; *see also* 40 C.F.R. part 50. These health-based standards set nationwide limits on the levels of certain types of pollution in the "ambient air." The Supreme Court has explained that "ambient air" was "the statute's term for the outdoor air used by the general public." *Train v. Nat. Res. Def. Council, Inc.,* 421 U.S. 60, 65 (1975). In 1971, EPA promulgated a regulatory definition of "ambient air" that defines the concept as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. §

[1] Signed December 2, 2019, but released publicly on EPA's NSR website on December 3, 2019 *available at* https://www.epa.gov/nsr/ambient-air-guidance.

50.1(e). It is this regulatory definition that the 2019 Policy contradicts and interprets in a manner that is arbitrary, capricious, and an abuse of agency discretion.

A. Prior Agency interpretations

EPA documents from the 1970s and 1980s reveal a narrow reading of what constitutes "non-ambient" air and outline how industry permit applicants must demonstrate that the air above parcels of land does not constitute "ambient air." For example, a 1977 EPA applicability determination notes that "the test for determining if public access is effectively precluded requires some kind of physical barrier." The 1977 applicability determination attaches a 1972 EPA Office of General Counsel Memorandum contemporaneous with the adoption of the regulatory definition of "ambient air."[2] The 1972 memo says:

> QUESTION #1 What is the meaning of the phrase "to which the general public has access" in EPA's definition of "ambient air"?
>
> ANSWER #1 We believe that the quoted phrase is most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering.

Id. at 2. The 1972 memo similarly points to the dictionary definition of "access" and notes that areas of private property "to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property." *Id.*

The 1972 memo finds that this focus on air quality is mandated by the statute itself, where "Section 107 of the Clean Air Act . . . provides: 'Each State shall have the primary responsibility for assuring air quality within the *entire geographic area* compromising such State . . . .'" *Id.* at 3 (emphasis added). The memo finds a limitation on EPA's ability to expand what is considered "ambient air" because "a definition of 'ambient air' that excepts fenced private property (or public lands) from the applicability of the Act is *probably inconsistent with the quoted statutory language; expanding the exception beyond its current limits is clearly not legally supportable*." *Id.* (emphasis added). In particular, the 1972 memo concluded that both the primary and secondary national ambient air quality standards mandate a very narrow concept of "non-ambient" air because:

> it is highly unlikely that adverse effects upon weather visibility, and climate can be so restricted. In addition, it is clear that despoliation of the landscape may affect the personal well-being of many individuals in the psychic sense, even if some sort of barrier separates them from the despoliation.

Id. The Agency thus believed a narrow interpretation of what constitutes non-ambient air was mandated by the statute. However, now, in a discussion relegated to the appendix of the 2019

[2] U.S. EPA, Letter from Walter C. Barber, Director Office of Air Quality Planning and Standards, MD-10 to Gordon M. Rapier, Director Air and Hazardous Materials Division, Region II (May 23, 1977), (enclosing Memorandum from Michael A. James, Attorney, Air Quality and Radiation Division, to Jack R. Farmer, Chief Plans Management Branch (September 28, 1972).

Policy, EPA arbitrarily dismisses the contemporaneous 1972 Office of General Counsel interpretation that an expanded exemption from what is considered "ambient air" beyond fenced private property "is clearly not legally supportable." 2019 Policy at 11-12. Accordingly, the 2019 Policy fails to adequately address an important part of the problem and fails to adequately explain the agency's reversal of its position and legal interpretation of the "ambient air" regulatory definition. This significant expansion, far beyond what EPA considered in its 1972 memo, is similarly not legally supported and is inconsistent with section 107 of the statute.

B. The 1980 Costle letter

In 1980, former EPA Administrator Douglas M. Costle addressed the definition of "ambient air" in a letter to then-Senator Jennings Randolph, Chairman of the Environment and Public Works Committee, dated December 19, 1980 ("Costle letter").[3] The Costle letter noted that an "exemption from ambient air is available *only* for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." *Id.* (emphasis added). Then-Administrator Costle noted that the "ambient air" analysis would "ensure that the public is adequately protected and that there is no attempt by sources to circumvent the requirement of Section 123 of the Clean Air Act." *Id.*

Notably, the Costle letter did not identify any basis in statutory language or the Act's legislative history for the exemption from "ambient air" outlined in the letter. Nor has EPA since then identified any statutory language or legislative history supporting the concepts introduced in the Costle letter. Moreover, the preamble to the 1971 Federal Register notice promulgating the "ambient air" definition contained no discussion of the phrase or the concepts used to define it.

Agency documents after the 1980 Costle letter further elucidate the concept of "ambient air." A 1985 EPA Memo notes that purchasing land as a "method of attainment is not considered desirable by EPA because it does not reduce the total atmospheric burden of a pollutant and may be inconsistent with Section 123 of the Clean Air Act," similar to dispersion techniques such as tall stack heights.[4] A subsequent 1987 agency analysis noted that "[i]f [a] physical barrier is not erected, then all land including the leased site would have to be considered as ambient air."[5]

C. December 2019 Policy

On December 3, 2019 EPA released its new policy reversing course on its longstanding approach requiring physical barriers to preclude public access, effectively altering the regulatory definition without formal public process. Under the historical policies described above, the Agency's longstanding approach has been that if a source demonstrates that "(1) the area, although external to buildings, is owned or controlled by the source, and (2) access to the area by the public is precluded by means of a fence or other physical barriers," and "only if both conditions described above are met," the area will be excluded from ambient air. EPA, *Draft Revised Policy on*

[3] Letter from EPA Administrator Douglas Costle to Senator Jennings Randolph, Chairman, Committee on Environment and Public Works, December 19, 1980.
[4] Memorandum from Darryl D. Tyler, Director, Control Programs Dev. Div. to Thomas Maslany, Chief Air Enforcement Branch, Region III, 3 (Mar. 1985).
[5] Memorandum from G.T. Helms, Chief, Control Programs Operations Branch to William S. Baker, Chief, Air Branch, Region II (July 27, 1987).

Exclusions from "Ambient Air" ("2018 Proposal") (Nov. 2018) at 2.[6] The 2019 Policy departs from this approach to exclude from the "ambient air" "the atmosphere over land owned or controlled by the stationary source . . . where the source employs measures, which may include physical barriers, that are effective in precluding access to the land by the general public." Without any factual support, EPA rests these changes on its assertions that a "*fence or other physical barrier* is not the only type of measure that may be used to establish that the general public does not 'have access' to an area of land that is owned or controlled by the source." 2019 Policy at 1. These changes make it easier for regulated sources to use land acquisition as an illegal pollution diffusion strategy. The 2019 Policy also contains no analysis of the likely environmental and health costs that it will have.

Furthermore, in the 2019 Policy, EPA states that industry representatives requested this change at least in part based on "advances in surveillance and monitoring capabilities . . . since 1980." 2019 Policy at 2. However, EPA provides no examples of currently available capabilities that warrant this change. The examples of measures that EPA gives are "video surveillance, monitoring, clear signage, [and] routine security patrols." 2019 Policy at 7. These are all measures that existed in 1980. EPA speculates "that there will be future technologies such as drones and more advanced video surveillance capabilities, that will potentially be used to preclude public access," 2019 Policy at 7, but provides no concrete examples of useful measures that represent "advances in surveillance and monitoring capabilities" since 1980. EPA's inability to identify a single example of such a measure belies the agency's explanation for this change.

BASES FOR RECONSIDERATION AND RULEMAKING

I. EPA'S 2019 POLICY IS FLAWED AND EPA SHOULD INITIATE A RECONSIDERATION PROCEEDING

As provided for under Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), EPA should immediately undertake a reconsideration proceeding of the 2019 Policy due to the Agency's failure to adequately consider the significant emissions increases likely to result from this policy change. Several public commenters provided detailed information and modeling that undercuts EPA's blanket assertion that this policy change would "maintain the same level of public health protection," 2019 Policy at 2, as previous Agency interpretations despite enabling potentially significant increases in pollutant emissions. These comments demonstrate that the 2019 policy is in tension with EPA's core duty to protect public health and welfare in carrying out obligations in the Clean Air Act. The Administrator should therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id*. at § 7607(d)(7)(B).[7]

[6] *Available at* https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf

[7] Alternatively, as requested below, EPA should undertake a notice-and-comment rulemaking to properly assess these same issues.

A. EPA presented no analysis to support or justify its assertion that the 2019 Policy will not increase pollution and not jeopardize public health protections

EPA asserts without any analysis that the 2019 Policy will "maintain the same level of public health protection," 2019 Policy at 2, as its prior approach, yet fails to offer a reasoned explanation or include any factual support for this claim. The Agency has further abdicated its responsibilities by entirely failing to analyze or disclose to the public any potential adverse impacts on air quality, public health, and the environment that would result from increased air pollution levels caused by increasing the geographical bounds of areas exempted from "ambient air." The 2019 Policy's primary effect is to exempt more outdoor air from complying with Clean Air Act requirements, and thereby allow more pollution to be emitted from stationary sources. EPA has failed to identify how this policy change is consistent with the Agency's obligations to protect public health and the environment. EPA's failure to assess this core element of the policy warrants reconsideration, and a reason why the 2019 Policy is arbitrary and capricious, and an abuse of agency discretion.

B. Information submitted to EPA demonstrates that increased air pollution will result from effectuating this change

The 2019 Policy results in the shrinking of legally protected "ambient air" under the Clean Air Act and information before the Agency, but not released to the public during the public comment period because there was not a proper docket for this action, illustrates that additional pollution will be allowed under EPA's policy despite EPA's assertion that public health protections will be maintained. 2019 Policy at 2. EPA should have completed its own analysis of the harmful public health consequences of its new ambient air policy. At the very least, the Agency should immediately reconsider this policy in light of the information submitted by commenters including American Forest & Paper Association, the Air Permitting Forum, the Auto Industry Forum, the American Wood Council, New Jersey Department of Environmental Protection, and others that demonstrate increases in air pollution will result from this change.

For example, the Ambient Air Boundary Test Cases modeling submitted to EPA by the American Forest & Paper Association, the Air Permitting Forum, the Auto Industry Forum, and the American Wood Council[8] concludes:

- For the 1-hour averaging period, modeled concentrations of NO_2 just 100 meters downwind of the modeled design concentration are 30% to 40% less and 500 meters downwind are 60% less. For example, a modeled 1-hour NO_2 design concentration of 200.0 $\mu g/m^3$ would be 140.0 $\mu g/m^3$ 100 meters further downwind and 80 $\mu g/m^3$ 500 meters downwind, differences much greater than the $\mu g/m^3$ 1-hour NO_2 Significant Impact Level ("SIL").
- For the 24-hour averaging period considering a point source, modeled concentrations just 100 meters downwind of the modeled design concentration are 50% less and 500 meters

[8] Comments of American Forest & Paper Association, the Air Permitting Forum, the Auto Industry Forum, and the American Wood Council - Attachment Ambient Air Boundary Test Cases (Nov. 9, 2018) ("Test Cases Modeling")at 153-177 *available at* https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf.

downwind are 75% less. For example, a modeled 24-hour $PM_{2.5}$ design concentration of 30.0 μg/m^3 would be 15.0 μg/m^3 100 meters further downwind and 7.5 μg/m^3 500 meters downwind, differences much greater than the 1.2 μg/m^3 24-hour $PM_{2.5}$ SIL. Similar results are seen in the modeling analyses using a volume source, though the model design concentrations at 500 meters downwind are closer to 90% less than the maximum concentration.[9]

- For the annual averaging period considering a point source, modeled concentrations just 100 meters downwind of the modeled design concentration are 30% less and 500 meters downwind are 70% less. For example, a modeled annual $PM_{2.5}$ design concentration of 10.0 μg/m^3 would be μg/m^3 100 meters further downwind and 3.0 μg/m^3 500 meters downwind, differences much greater than the 0.2 μg/m^3 annual $PM_{2.5}$ SIL. As with the 24-hour averaging period, similar results are seen in the modeling analyses using a volume source with the model design concentrations at 500 meters downwind closer to 90% less than the maximum concentration.[10]

If accurate, this modeling demonstrates that significant emissions increases are to be expected under the application of EPA's 2019 policy. For example, using these modeling assumptions for a source where the 1-hr NO_2 modeled design concentration is located at the "ambient air" boundary and is equal to the NAAQS of 188 μg/m^3:

- If that same source is allowed to expand the "ambient air" boundary 100 meters downwind then the source could effectively increase its emissions by an amount that would result in a modeled ambient impact at the prior "ambient air" boundary that is 30-40% higher (i.e., the modeled design concentration would increase from 188 to between 244-263 μg/m^3) such that the concentration at the "ambient air" boundary provided for under the 2019 Policy – i.e., 100 meters further downwind from the source – would now be 188 μg/m^3. The magnitude of the effective emissions increase would depend on meteorological conditions (e.g., winds, stability, etc.), terrain, etc.[11]
- If that same source is allowed to expand the "ambient air" boundary 500 meters downwind then the source could effectively increase its emissions by an amount that would result in an ambient impact at the prior "ambient air" boundary that is 60% higher (i.e., the ambient air impact would increase from 188 to 300 μg/m^3) such that the concentration at the "ambient air" boundary provided for under the 2019 Policy – i.e., 500 meters further downwind from the source – would now be 188 μg/m^3. The magnitude of the effective emissions increase would depend on meteorological conditions (e.g., winds, stability, etc.), terrain, etc.[12]

The resulting increase in air pollutant concentrations modeled is similar to the examples described in the GAO's 1989 Report *EPA's Ambient Air Policy Results in More Pollution.*[13] The

[9] *Id*. Test Cases Modeling Attachment at 1-2.
[10] *Id*. Test Cases Modeling Attachment at 1-2.
[11] *Id*. Test Cases Modeling Attachment at 3.
[12] *Id*. Test Cases Modeling Attachment at 3.
[13] U.S. Gen. Accounting Office, *GAO/RCED-89-144*, *Air Pollution: EPA's Ambient Air Policy Results in Additional Pollution*, (1989) ("GAO Report") *available at* https://www.gao.gov/assets/150/148003.pdf

GAO Report assessed EPA's previous policy as it was designed to "allow flexibility" for industrial emitters, but that had, over the decade looked at in the report, been "stretched," resulting in "increased pollution." GAO Report at 3, 14. The report cites two air permits from the 1980s in which EPA's ambient air policy had "resulted in the approval of increased source emission rates that would not have been allowed if the analyses had included land areas controlled by the company." *Id.* at 14. In both examples, sources had modeled nonattainment demonstrations, then purchased land around their facility and were granted increased permit limits. The purchased land allowed them to expand the "ambient air" boundary, similar to the potential effect of EPA's 2019 Policy. In one example, the Maryland Paper Mill Case, 9,000 acres of company-controlled property was excluded from consideration in the modeling analysis used to set the mill's SO_2 emissions limit. *Id.* The result was a 35% emissions increase (from 49 tons per day to 66 tons per day). *Id.* In the second example, the Utah Copper Smelter Case, 76,800 acres of unfenced property was excluded from ambient air in the modeling analysis used to set SO_2 emissions limits allowing for an increase in emissions from the facility from an average of 72 tons per day to an average of 218 tons per day (more than a 200% increase).The 2019 Policy would authorize more expansive ambient air boundaries and these past analyses have underscored the harmful pollution impacts associated with such an approach. *Id.*

The GAO Report compared this approach to the use of tall stacks as a dispersion technique:

> both techniques increase allowable emissions by increasing the distance between the source and locations where air quality is monitored or modeled. This increased distance allows pollutant concentrations to be diluted prior to their contact with the monitored or modeled locations. As a result of this dilution, source emissions can be increased without causing violations of air quality standards.

Id. at 18. In fact, the GAO Report cites an EPA Associate General Counsel who noted in 1976 "that land acquisition as an acceptable control avoidance technique would make a 'laughingstock' out of EPA and would be a 'palpable (and incredible) affront to the Clean Air Act.'" *Id.* at 15. This "affront" to the Clean Air Act is the same approach EPA has now finalized in the 2019 Policy, and the Test Cases Modeling, along with well-established patterns of pollution fate and transport, demonstrates that EPA should have known that these pollution increases would occur. Nonetheless, EPA finalized the document without any assessment of the public health and environment impacts of this change.

Another example that points to potential emissions increases and factors EPA has not properly considered appears in comments from the New Jersey Department of Environmental Protection. ("NJDEP").[14] NJDEP argued that EPA's policy change "will allow existing sources to increase emissions where they could not before," resulting in "new polluting sources to be built where they would impact a nonattainment area." *Id.* NJDEP noted that this was "especially concerning since some states upwind of New Jersey are statutorily precluded from being more stringent than EPA. Therefore, these states would allow sources to ignore any violations based on this new

[14]Comments Submitted by Danny Wong on behalf of Department of Environmental Protection – Division of Air Quality (Jan. 9, 2019). EPA Record No. 19 *available at* p 47 of https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf

policy and other recent EPA relaxations. The results would be more pollution being transported into New Jersey that will negatively impact the State's air quality." *Id.*

NJDEP also pointed to air quality modeling for EPA's Cross-State Air Pollution Rule (CSAPR) Update, which shows the NJ-NY-CT nonattainment area would attain the 2008 ozone NAAQS by 2023. NJDEP argued that EPA's CSAPR Update "modeling did not account for the many recent" deregulatory actions by EPA, like the 2019 Policy, "that relax requirements on emission sources, each of which has the potential to cause an increase of emissions." *Id.* NJDEP notes that "the likely effect of EPA's wide-ranging deregulatory efforts substantially undermines EPA's modeling assumptions." *Id.* At the very least, the Agency should address and respond to these concerns and assess whether the 2019 Policy threatens reductions projected for nonattainment areas and in programs like CSAPR.

EPA received information demonstrating that this policy will increase emissions yet did not conduct any analysis to assess the full scope of the 2019 Policy's public health, air quality and environmental impacts. Because this information became public after the informal comment period closed and these concerns are of central relevance to the outcome of this final action EPA should reconsider the 2019 Policy.

II. EPA SHOULD UNDERTAKE NOTICE-AND-COMMENT RULEMAKING TO ENSURE THE AGENCY'S REGULATORY DEFINITION IS ADEQUATELY PROTECTIVE

EPA has long recognized that its ambient air policy could allow more pollution than is allowable under the Act and that the Agency should undertake a formal notice-and-comment rulemaking to ensure the policy and regulatory definition of "ambient air" are in line with the Agency's directives under the Clean Air Act to protect public health and the environment. Instead, EPA's finalization of this document is arbitrary, capricious, and contrary to the plain meaning of the Clean Air Act. This revision also conflicts with the Agency's existing regulatory definition of "ambient air," in 40 CFR §50.1(e). In light of these core deficiencies, EPA should open a notice-and-comment rulemaking to ensure the "ambient air" policy and regulatory definition are adequately protective of public health and the environment. EPA should also notify the public and allow for public notice-and-comment when the Agency approves individual applications of this exemption, and require air agencies to do the same.

A. EPA has known since 1989 that its "ambient air" policy is not protective enough and that the Agency should undertake a notice-and-comment rulemaking

For over three decades, EPA has been aware of the need to open up a formal process to assess the adequacy of its pre-existing policy on exclusions from "ambient air" – a policy the agency has now substantially expanded upon without the required public input processes. In 1989, Congress requested that the GAO undertake a review of EPA's approach to the definition of "ambient air." The GAO Report, mentioned above, concluded that EPA should undertake a formal notice-and-comment rulemaking to resolve significant problems in its policy on exclusions from "ambient air."

EPA has also been aware since the 1989 GAO report that other rational approaches exist that would better protect public health and the environment consistent with the goals of the Clean Air

Act. In contrast to the two examples described above, the Maryland Paper Mill Case that resulted in a 35% emissions increase and the Utah Copper Smelter Case that resulted in more than a 200% emission increase, the GAO Report pointed to the approach adopted by Arizona. At the time, Arizona "defined ambient air to exclude only that area around the source required for work processes." GAO Report at 17. That state reported "little difficulty defining those work areas and ha[d] experienced no court challenges since the practice was adopted in the late 1970s." *Id.* EPA in fact considered a policy similar to Arizona's approach, and certain members of the General Counsel's Office found it to be "consistent with the 1977 Amendments' emphasis on attaining standards through continuous emission reduction rather than by dispersion dependent techniques." *Id.* at 15. In contrast to Arizona's approach, the GAO found that retention of EPA's existing policy "provided no incentive for innovation in control or process technologies." *Id.* at 16. In pointing to the Arizona example and the internal back and forth on EPA's policy, the GAO Report strongly recommended that "EPA initiate a formal rulemaking action to redefine ambient air in a manner that is more protective of the environment." *Id.* at 21.

The GAO Report concluded with a request for formal notice-and-comment rulemaking based on "(1) the significant environmental consequences of EPA's policy which allowed increased emissions and (2) the feasibility of an alternative interpretation of ambient air boundaries which restricts the size of nonambient air." *Id.* These concerns are heightened in the 2019 Policy, which further departs from the definition of "ambient air," – "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e).

B. EPA's regulatory definition of "ambient air" must be in line with the Clean Air Act's mandate to protect human health and welfare

The 2019 Policy does not consider how the approach it suggests will protect public health and the environment, nor does it implement a reasonable interpretation of "ambient air." Instead, the final 2019 Policy limits the concept of "ambient air" beyond a reasonable statutory interpretation and contradicts EPA's implementing regulation in order to facilitate flexibility, which is not the purpose or goal of the Clean Air Act. This expansion will result in greater emissions of regulated air pollutants and more violations of national ambient air quality standards that EPA will ignore because they did not occur in outdoor air defined as "ambient air." These changes plainly make it easier for industrial sources to emit higher levels of regulated air pollution and directly contravene Congress's primary charge to EPA in carrying out the Clean Air Act.

Congress's foremost goal in the Clean Air Act is to protect public health and welfare. *See*, *e.g.*, 42 U.S.C. § 7401(b)(1) ("The purposes of this subchapter are to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"); § 7408(a)(2) ("Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare that may be expected from the presence of such pollutant in the ambient air, in varying quantities."); § 7409(b) (national primary & secondary ambient air quality standards shall protect public health and welfare). There is no indication in the Act or its legislative history that Congress meant to exclude from protection against adverse public health effects workers, visitors, or delivery people at stationary sources, people who hike lands adjacent to stationary sources, or anyone who may cross property boundaries with occasional signage or drones. Nor is there any indication that Congress meant to exclude private

property from protection against adverse welfare effects. Indeed, while EPA claims (without support) that the 2019 Policy will maintain public health protection, it does not claim that it will maintain the protection of public welfare that is also required by the Act. Any definition of "ambient air" must encompass areas that are protected by the secondary NAAQS standard, which is intended to prevent welfare effects defined as "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. § 7602.

Finally, as discussed at greater length in our comments on the 2019 Policy,[15] there is no evidence that Congress intended to deny the protections of the Clean Air Act to Americans, and exempt "ambient air" from safeguards, merely because some lands employ "measures" like those discussed in the 2019 Policy. EPA fails to provide any support for the notion that Congress intended property to be exempt from Clean Air Act requirements because the owner employs surveillance cameras or signs in the vicinity. Yet this kind of exemption, which is not contemplated by the Act, is what the 2019 Policy would allow.

EPA should undertake a notice-and-comment rulemaking process complete with required public health and environmental analyses to ensure that its regulatory definition and current policy on exclusions are in line with the statutory mandates of the Clean Air Act.

C. EPA's 2019 Policy is an unlawful legislative rule disguised as a guidance document and is arbitrary and capricious

As discussed in depth in our comments on the 2019 Policy, *id.* at 14-17, this kind of change in policy should be undertaken through a legislative rule, and EPA's finalization of this document is arbitrary, capricious, and contrary to the plain meaning of the Clean Air Act. EPA fails to provide a reasoned explanation for this change and fails to address significant aspects of the problem, including the health and welfare impacts of increases in pollutant emissions that would be enabled under the 2019 Policy. This revision also conflicts with the Agency's existing regulatory definition of "ambient air" in 40 CFR §50.1(e).

The 2019 Policy is also procedurally deficient because it represents an unlawful attempt by EPA to circumvent the rulemaking process by portraying a legislative rule with significant legal, environmental, and public health implications as simply agency guidance. EPA is reinterpreting the statutory term "ambient air" to allow that "the atmosphere over land owned or controlled by the stationary source may be excluded from ambient air where the source employs measures, which may include physical barriers, that are effective in precluding access to the land by the general public." 2019 Policy at 9. This expansive exclusion is inconsistent with the existing regulatory definition of "ambient air," and therefore the 2019 Policy "effectively amends" rather than interprets the regulation, making it a procedurally deficient legislative rule rather than an interpretive rule. *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). This inconsistency is particularly evident in the types of measures EPA claims could be used to qualify for an exclusion, including signage and video surveillance, which do not prevent public access to land. The 2019 Policy also uses language that is binding and gives air

[15]Joint Comments of Environmental Organizations on EPA's "Revised Policy on Exclusions from Ambient Air" (January 11, 2019) ("Environmental Comments").

agencies "marching orders," which indicates that it also cannot be a non-binding policy statement. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

Notwithstanding boilerplate language to the contrary, the 2019 Policy fulfills the criteria for a legislative rule set forth by the U.S. Court of Appeals for the D.C. Circuit and described in our 2019 Comments. Accordingly, EPA must fulfill the applicable requirements under the Administrative Procedure Act.

D. EPA's finalization of the 2019 Policy relied on fatal process failures

The abnormal process EPA has undertaken to finalize its 2019 Policy has been highly unusual—for either a legislative or interpretative rule—and is fatally flawed. The Agency did not open up an official rulemaking docket on regulations.gov, or issue a Federal Register notice informing the public of these important changes and soliciting comments. The Agency contends a docket was unwarranted because this action is not "a regulation subject to notice-and-comment rulemaking requirements nor a final agency action." 2019 Policy at 2. Following this premise the agency has provided none of the information required by the Clean Air Act for a rulemaking under section 307(d)—no factual data whatsoever on which the proposal is based, or statement of basis and purpose. The Agency has also failed to undertake a regulatory impact analysis or any other assessment of the public health impacts. Meanwhile, the Agency posted the proposed changes to an obscure subpage on EPA's website, and accepted comment submissions by email, without issuing a formal Federal Register notice to notify the public and without opening a formal comment period. Unsurprisingly, without formal public notice the comments received on the proposal reflected input from industry groups but did not fully reflect input from the general public. The Agency received only 37 comments on this nationwide action and responded to only some of the issues raised by commenters.[16]

Later in the process, EPA sent the proposal to the While House Office of Management and Budget for interagency review, yet did not include any regulatory impact analysis, or any assessment of the obvious public health implications of this change that would be customary for OMB review. The OMB review docket had also been misnamed for the entire duration of OMB review, possibly deterring groups from requesting meetings on this change since the name of the proposal did not match the name listed on the OMB website.[17]

E. EPA took this action at the request of industry alone

Finally, it appears that EPA has finalized the changes reflected in the 2019 Policy directly at the behest of regulated industry. EPA claims that unidentified "stakeholders" have argued that the previous ambient air policy is "overly restrictive" and that the "restrictive language from the 1980 [Costle] letter . . . should be updated." 2018 Proposal, at 2. Over the last three years, numerous industry groups and associations have sought the same specific changes to the

[16] Only 4 comments appeared to be submitted by members of the general public, only 2 comments submitted from environmental and public health groups. By contrast, 12 comments were submitted by industry groups and associations.

[17] Listed on the OMB website as "Ambient Air Policy for Air Quality Analyses in Prevention of Significant Deterioration Permitting," but actually named "Revised Policy on Exclusions from "Ambient Air." EPA has clarified that, "in addition to PSD permitting. . . the EPA intends to apply the revised policy to other NAAQS-related assessments and characterizations of air quality. 2019 Policy at 9.

definition of "ambient air" that EPA has now adopted.[18] The Agency's eagerness to revisit this regulatory definition now, at industry's request, stands in stark contrast with its failure to take up formal rulemaking in order to ensure that the policy is in line with EPA's core duties to protect public health and the environment. As discussed above, almost three decades ago, a GAO report recommended "that the EPA Administrator initiate a formal rulemaking process to redefine ambient air in a manner that is more protective of the environment." GAO Report at 3. EPA should now undertake this long overdue effort.

CONCLUSION

EPA's 2019 Policy is an unlawful expansion of a longstanding agency policy on exclusions in violation of the Clean Air Act and its regulations that will result in more harmful pollution in communities across the country. The Agency is taking this action without undergoing legally required notice-and-comment rulemaking procedures and engaging in other required analyses. We request that EPA undertake a reconsideration proceeding for its 2019 Policy and open a notice-and-comment rulemaking process to adopt a broader conception of "ambient air" that provides better protection for human health and the environment, consistent with the Clean Air Act. If you have any questions about this petition please reach out to Rachel Fullmer at rfullmer@edf.org.

Hayden Hashimoto
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
hhashimoto@catf.us

Rachel Fullmer
Environmental Defense Fund
1875 Connecticut Ave NW, Ste 600,
Washington, DC 20009
rfullmer@edf.org

Sanjay Narayan
Sierra Club
2101 Webster St. Ste 1300
Oakland, CA 94612
Sanjay.Narayan@sierraclub.org

Emily Davis
Natural Resources Defense Council
1152 15th St NW, Ste 300
Washington, DC 20005
edavis@nrdc.org

[18] *See* Environmental Comments, at 19-20.